

IN THE CIRCUIT COURT OF THE  
 SIXTH JUDICIAL CIRCUIT IN AND FOR  
 PINELLAS COUNTY, FLORIDA  
 CASE NO.: 97-5968-CI-11

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X	
:	
JOHN EASTMAN,	:
	:
Plaintiff,	:
	:
vs.	:
	VOLUME XXXIX
	:
BROWN & WILLIAMSON TOBACCO CORP.,	:
individually and as successor by	:
merger to THE AMERICAN TOBACCO	:
COMPANY, a foreign corporation;	:
PHILIP MORRIS, INCORPORATED, a	:
foreign corporation,	:
	:
Defendants.	:
X	
BEFORE:	HONORABLE ANTHONY RONDOLINO
PLACE:	The Judicial Building
	545 First Avenue North
	St. Petersburg, Florida
DATE:	Wednesday, April 2, 2003
TIME:	1:00 p.m. - 2:00 p.m.
REPORTED BY:	TONYA H. MAGEE, RPR
	Court Reporter and Notary Public
	Sixth Judicial Circuit

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## TRIAL PROCEEDINGS

Pages 4258 - 4302

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1 P R O C E E D I N G S  
2 THE COURT: Welcome back, ladies and  
3 gentlemen. At this time, Philip Morris will  
4 proceed with their closing remarks.  
5 Mr. Lydon.  
6 MR. LYDON: Thank you, Judge Rondolino, and  
7 thank you, ladies and gentlemen of the jury.  
8 I want to step back this way in order that  
9 when we're viewing the screen I don't want to be  
10 blocking your view.  
11 First I want to thank you for your sense of  
12 duty and we are grateful for the time that you  
13 extended over the last several weeks to hear the  
14 evidence in this case. Hopefully, we worked, as we  
15 promised you we would, to expeditiously,  
16 effectively, efficiently keep you -- using your  
17 time -- excuse me -- to the best possible effect.  
18 Now, you heard a lot in this case about some  
19 rather complex subjects, and what I would like to  
20 do is take some time at this point to try to assist

21 you in marshalling that evidence and understanding  
22 it and assist you toward reaching what we feel the  
23 evidence supports and what you can draw from it in  
24 terms of basic conclusions.  
25

Understanding, of course, this is

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1 Mr. Eastman's case, not anybody else's case. He  
2 brought claims that were personal to him. He  
3 claims that he has these diseases that have been  
4 caused by his cigarette smoking and that this was  
5 the fault of the designs of the cigarette  
6 companies.

7 Now, the first thing we feel that he has not,  
8 as he must, is that he has a cigarette-caused  
9 disease. We're going to go into that in more  
10 detail. But our position, first and foremost, is  
11 that John Eastman does not have a cigarette-caused  
12 disease, and specifically, we're talking about both  
13 the obstructive lung disease; we're also talking  
14 about his abdominal aortic aneurysm.

15 Now I want to tell you that even if he did  
16 have a cigarette-caused disease, it would not have  
17 been caused by anything that Philip Morris or Brown  
18 and Williamson did or didn't do. The third thing I  
19 want to tell you is that even if he had a  
20 cigarette-caused disease, it would have been caused  
21 as a consequence of his whole lifestyle choice to  
22 smoke cigarettes, more importantly, to continue to  
23 smoke cigarettes and not to quit smoking.

24 Now, there are a few subjects as controversial  
25 as cigarettes. If you remember back at the

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1 beginning of the trial, I put these two slides -- I  
2 actually put them up one after another in front  
3 you. Of course, instead of saying "what did the  
4 evidence show," it said "what will the evidence  
5 show". But, otherwise, these are the things we  
6 said we thought you would find from your review of  
7 the evidence in this case.

8 As I said, when you look at this you can see  
9 the part where -- I mean when I say there have been  
10 a few subjects as controversial as cigarettes. The  
11 risks to health from cigarettes have long been  
12 known to the ordinary American. We, as a people  
13 through our congress, have decided that adults who  
14 are aware of the health risks of smoking are free  
15 to choose to smoke. That's one of the basic facts  
16 that I laid out for you there, and you see it as  
17 number three on your right.

18 At the same time, over at least the last 50  
19 years to the present, as science and technology has  
20 improved and has pointed more specifically to more  
21 and more suspected constituents or chemicals in  
22 cigarette smoke, Philip Morris and the other  
23 manufacturers, including Brown and Williamson, have  
24 been working hard to reduce the harm from those  
25 products through filtration, through the renovation

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1 and through the other means that were describe by  
2 Dr. Lipowicz.

3 Despite what has been done, there is no safe  
4 cigarette. There hasn't been a safe cigarette.  
5 You heard Dr. Lipowicz say that he didn't know of

6 one that was feasible at this time or imaginable at  
7 this time. So when you think about it, there's a  
8 great deal of common sense in this that's inherent  
9 in the product itself. You know, the plant leaf,  
10 which you're rolling, lighting one end and inhaling  
11 the other.

12 That smoke from a common sense prospective  
13 wouldn't be a healthy thing to do, but as time has  
14 gone on we've learned more and more about what  
15 actually is in the smoke, and the companies have  
16 been working to try to reduce it. Even that last  
17 product that you heard Dr. Lipowicz describe, the  
18 Accord, it couldn't get rid of all of the  
19 benzo(a)pyrene.

20 Mr. Acosta pointed out that benzo(a)pyrene is  
21 something people had been aware of for quite a  
22 while. True enough. But even when you burn the  
23 tobacco, there's some amount of benzo(a)pyrene  
24 that's drawn from the smoke generated from the  
25 heated cigarette.

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1 That's the point, I guess, with number three  
2 on the other side. There is no safer cigarette  
3 which Philip Morris or Brown and Williamson could  
4 have made that John Eastman would have smoked. And  
5 again, understand, we're talking about lighted  
6 cigarette. We're talking about something that you  
7 smoke, not something that you don't smoke. We're  
8 not talking about a nicotine inhaler.

9 For as long as John Eastman has been smoking a  
10 Philip Morris product, beginning with Marlboro near  
11 or around 1960, there's been no evidence of any  
12 document, any ad or anything anybody wrote that  
13 gave John Eastman any assurance that he was doing  
14 anything more than choosing to continue to risk his  
15 health for the benefit of the immediate pleasure  
16 and the satisfaction that he got from cigarette  
17 smoking. That's an adult choice that he was  
18 entitled to make.

19 Point number one, John Eastman was aware of  
20 the health risks of smoking. Indeed, they were  
21 common knowledge. His own words say it best. You  
22 heard them already this morning, but I'm going to  
23 repeat them for you here again today. It wasn't  
24 for long or -- excuse me, not long after 1960,  
25 somewhere around 1960 or 1961 that he had that that

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1 testicle removed and received radiation treatment.

2 And at that time, he describes -- maybe it was  
3 in the room where he was receiving radiation  
4 treatment -- maybe he was leaving a physician's  
5 office -- but he describe as he looks back on his  
6 life, re-examined his lifestyle and decided what he  
7 was going to do about something, like smoking or  
8 drinking.

9 This is taken from his testimony in the course  
10 of a deposition and what you can see is we pulled  
11 certain portions of these pages. I'll read it  
12 again.

13 Question: "I think what you're saying so to  
14 me is, with this last statement, this says sometime  
15 in connection with the your orchiectomy, which is  
16 the testicle removal, you begin to ponder what

17 you've been hearing and considering in light of  
18 your own mortality that you now had brought to the  
19 fore as a result of your cancer diagnoses?  
20

Right.

21 Then perhaps you should stop and take stock of  
22 what you have been refuting up to that point or  
23 denying up to that point."

24 His answer: "No. Specifically, that there  
25 was -- that there were -- was there any life chose

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1 or habit or substance abuse or personality trait or  
2 other that I was doing that I proposed to myself  
3 not to do periodically, and I didn't include  
4 tobacco as something that I wished not to do or  
5 could not do or would not do. I just said I'm  
6 going to smoke, I'm going on smoking. I'm going to  
7 take a drink when I want to, and I'm going to  
8 continue in my profession and I'm going to try to  
9 have a positive feeling about life and I am going  
10 to beat this thing."

11 Now, that's a rational decision that he made.  
12 There was nothing -- you know, he wasn't at fault  
13 in any way in making that decision. That's a  
14 choice that he made. That's how he decided he  
15 wanted to live his life, and he was entitled to do  
16 that.

17 He also knew at or about that time that  
18 cigarette smoking was linked to serious disease,  
19 like lung cancer and respiratory disease. In that  
20 respect, again, I'll refer you to what he  
21 acknowledged when he was first deposed and asked  
22 questions about the lawsuit that he had brought.

23 Question: "The disease that you associated  
24 with smoking, not necessarily believing that you  
25 were going to get them?"

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1 Use your common sense and believe that he  
2 believed he wasn't going to get them.

3 "But that you associated with smoking your  
4 lung cancer and emphysema, right?

5 No. I associated smoking with respiratory  
6 disease, of which I was not able to enunciate the  
7 type or kinds, as I am today.

8 But you knew about lung cancer, though?"

9 His answer: "I knew lung cancer and  
10 respiratory disease."

11 Now, it doesn't get much more serious in terms  
12 of diseases than lung cancer. So, my point is,  
13 that at the time that he took stock, that he  
14 decided how he was going to live his life, he  
15 decided that despite knowing about lung cancer and  
16 respiratory disease, that he was going to go on  
17 living and doing as he had. He was going to smoke  
18 because he wanted to smoke.

19 So, if smoking did indeed medically cause the  
20 diseases he claims, those diseases were legally  
21 caused by his own free choice, his own exercise of  
22 freewill. His decision as to how he was going to  
23 live. On the other hand, based on the evidence in  
24 this case, it is very, very doubtful -- and bear in  
25 mind that we don't have the burden of proof -- but

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1 it is very, very doubtful that smoking cigarettes

2 caused John Eastman's COPD or abdominal aortic  
3 aneurysm.

4 Remember the slide --

5 Could we have number one again, please.

6 Remember slide number one. I told you this at  
7 the very beginning, "Cigarette smoking causes  
8 cancer, aneurysms, emphysema and other forms of  
9 chronic obstructive pulmonary disease. We stand by  
10 that that's a basic fact." That's true. But to  
11 say that that is true does not mean that it causes  
12 aneurysms or COPD or emphysema in every instance.

13 Indeed in this instance, our suggestion is  
14 that the evidence would point to other causes. Of  
15 course other causes exist, and you heard that from  
16 the witness stand from virtually every medical  
17 expert. They talked about these diseases in terms  
18 of risk factors. But more importantly, when we got  
19 down to the evidence in this case and what the  
20 experts had to say in this case, it makes it much  
21 more probable that the COPD that John Eastman had  
22 was caused by a severe lung infection that  
23 devastated him in late May 1995.

24 Could we look at number four, please?

25 Remember this? This was an exhibit that was

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1 used with both Dr. Goldman and Dr. Goldstein. And  
2 it's particularly significant that prior to 1995 --  
3 and they were in agreement on this. Prior to 1995,  
4 both Dr. Goldman and Dr. Goldstein could point to  
5 no complaint, no documented shortness of breath, no  
6 signs of respiratory disease before May of 1995  
7 when he had that illness.

8 The oximetry, which was alluded to this  
9 morning, we can talk about that in a little more  
10 depth, but that's the test to determine how much  
11 oxygen was in his blood. Dr. Goldstein -- first of  
12 all, Dr. Goldman didn't come up with that during  
13 the cross-examination on Friday. It was only on  
14 redirect on Monday that he came up with the  
15 possibility that in June of '94, when his ribs were  
16 broken, that somehow he had low levels of oxygen.

17 You heard Dr. Goldstein explain that little  
18 figure pretty clearly. What he told you was that,  
19 first of all, the broken ribs no doubt bruised his  
20 lungs. That in and of itself would reduce the  
21 ability of the lungs to exchange oxygen. He also  
22 told you that because of the bruised ribs,  
23 naturally it would be more difficult for an  
24 individual to inhale or to exhale, and as a  
25 consequence, that would reduce the amount of

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1 oxygen.

2 More importantly than the both of those, he  
3 didn't find that 90 number as being particularly  
4 abnormal or unusual, and as he pointed out, it was  
5 altogether consistent with someone who had broken  
6 ribs. Except for that one point there's  
7 absolutely nothing that anybody could point to,  
8 either Dr. Goldstein or Dr. Goldman with respect to  
9 what occurred prior to May of 1995.

10 And we could go through the evidence, but I'm  
11 sure you remember, knee fracture, anesthesia in  
12 '83, no complaints of shortness of breath.

13 Likewise, in 1988 when he had anesthesia again with  
14 the penile implant, no complaints of shortness of  
15 breath. There were no complaints of shortness of  
16 breath in December of 1994, six months -- not even  
17 six months prior to the onset his illness.

18 And as Dr. Goldstein made clear, with respect  
19 to those rib fractures, it's just inconceivable  
20 that if Mr. Eastman had a progressive disease,  
21 something like emphysema that was due to his  
22 cigarette smoking, that it wouldn't have shown up  
23 before 1995, that it wouldn't have shown up, in  
24 particular, in June of 1994, when he broke those  
25 ribs.

4272

1 If we could look at -- Dr. Goldman,  
2 plaintiff's witness, was examined on this subject,  
3 and he agreed that typically or usually he'll -- he  
4 also went on to say in fairness to their --  
5 instances where it occurs outside of this region as  
6 well, but what he said was usually about  
7 emphysema --

8 THE COURT: What is that? We're getting some  
9 feedback.

10 MR. LYDON: In any event, going back to this  
11 exhibit, which you'll remember was the subject of  
12 cross-examination of Dr. Goldman, plaintiff's  
13 pulmonology expert, he acknowledged that it was  
14 usual for the symptoms of emphysema to show up in  
15 susceptible smokers between 30 and 35 years after  
16 they became regular smokers.

17 We know, from the testimony in this case, that  
18 Mr. Eastman began as a smoker sometime prior to  
19 1946. I believe his testimony was that it was  
20 somewhere around 1944. He may have in fact  
21 admitted earlier than age 16. But, certainly by  
22 the time 1946 to 1948 came around, when he was in  
23 college at Iowa State, he was a pack-a-day smoker.

24 Now, if you just follow what Dr. Goldman  
25 said -- what Dr. Goldstein said about the usual

4273

1 onset of this illness from the time a susceptible  
2 smoker begins smoking until the time when he starts  
3 showing symptoms, that takes us no further than  
4 1983. Yet, in 1983, we know from the previous  
5 slide you saw when he went in for the knee surgery,  
6 he had no symptoms. He had no symptoms in '87. He  
7 had no symptoms in '88. He had no symptoms in  
8 1994.

9 If we look at number six. This was also  
10 something that we talked about with Dr. Goldman,  
11 and he had to concede this, as well. The first  
12 complaint of shortness of breath was in May of  
13 1995. That's 48 years after the man started to  
14 smoke. That's much later than when a susceptible  
15 smoker usually shows symptoms of emphysema, if it's  
16 caused by cigarette smoking.

17 And so, to begin with, we've got this unusual  
18 circumstance of the timing of these symptoms. We  
19 have the unusual circumstance of the presentation,  
20 that is to say, nothing before this sudden illness.

21 There is no doubt about the fact that the man  
22 was very, very sick in May of 1995. You heard some  
23 discussion of Terry Legatti this morning in how he

24 was blue when she took him to the hospital. He  
25 reported at the time he was admitted in June of

4274

1 1995, having had 103 fever, the nausea, the  
2 vomiting headaches. The man was very, very ill.  
3 That's not COPD. That's a severe lung infection.

4 And what did Dr. Goldman, on  
5 cross-examination, say about that? It took a bit  
6 of work with him to finally acknowledge it, but,  
7 indeed, he did acknowledge it.

8 If we could have page 2644, please.

9 This was his testimony beginning on line nine.  
10 "But the answer that was given in the past is that  
11 it could be severe diffuse viral pneumonia?"

12 Answer: I think rarely if you have diffuse  
13 severe viral pneumonia or diffusely severe abnormal  
14 x-ray that it can lead to this."

15 In other words, what he is acknowledging is  
16 that indeed there are severe lung infections that  
17 can in fact trigger something like emphysema.

18 "Would it make any difference whether it was  
19 viral or bacterial?"

20 He goes on: "Well, I think that certain  
21 bacterial infections, like tuberculosis, which is  
22 bacterial, it can certainly do that.

23 So that any really severe, overwhelming lung  
24 infection that was diffuse could lung emphysema  
25 then, right?

4275

1 Well, as I think you can see here, if you had  
2 diffuse infection on the chest x-ray, I think  
3 that's certainly possible."

4 Now, notice, he uses this weasel word-, but  
5 when he's trying to slide off of his testimony with  
6 references to the chest x-ray, "ignore the chest  
7 x-ray." He told you and Dr. Goldstein told you,  
8 you can't disease emphysema on a chest x-ray. What  
9 I'm going to suggest to you is that his testimony,  
10 and I am talking about Dr. Goldman at this point in  
11 time, concedes the possibility of this being an  
12 infection that triggered the emphysema.

13 And again, think back on how this disease  
14 grows. You should also look back to Dr. Goldstein,  
15 because Dr. Goldstein came in and testified --

16 May we have 3432, please.

17 This was in defense presentation of evidence,  
18 and he is the pulmonologist. But Dr. Goldman asked  
19 his opinion specifically about what he thinks was  
20 the cause of the obstructive lung disease that  
21 Mr. Eastman has had since 1995. That question at  
22 the top.

23 "Doctor, in your opinion, what was the most  
24 important factor to a reasonable degree of medical  
25 probability that caused the obstructive lung

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1 disease that Mr. Eastman has had since 1995?"

2 The answer: "I feel, based on the information  
3 that we discussed, the most in fact" -- excuse  
4 me -- "important factor was this respiratory  
5 infection in 1995".

6 So -- could we look at seven, please.

7 This is what Dr. Goldstein also pointed out,  
8 other factors that you should consider in whether

9 smoking was the cause of this severe COPD.  
10

11 "Amongst smokers, four or five smokers never  
12 develop clinically significant COPD." By the way,  
13 on this point, Dr. Goldman agreed with  
14 Dr. Goldstein. Again, just as we were taking about  
15 usual onset, these guys were pretty close to  
16 agreement on everything, except that ultimate,  
ultimate question.

17 "As to non-smokers, many people who never  
18 smoke develop COPD."

19 Finally, "in COPD cases, nine out of ten COPD  
20 cases are not pure emphysema." What is the  
21 significance of that? Well, it lends its support  
22 that there are other causes here that are at work  
23 and that in this instance, the opinion that  
24 Dr. Goldstein gave was a correct one, the more  
25 probably one.

4277

1 If we look at the next line, which is slide 8.  
2 What does Dr. Goldstein say? This is a brief  
3 overview of his opinions. First of all, no  
4 evidence that Mr. Eastman had COPD prior to his  
5 1995 respiratory infection. And other than the  
6 oximetry reading, Dr. Goldman didn't dispute that.

7 Number two, "Mr. Eastman's 1995 severe  
8 respiratory infection was the most important factor  
9 in his obstructive lung disease." We know what's  
10 that based upon. This is Dr. Goldstein's opinion a  
11 few short seconds or a minute ago. And we also  
12 know and that Dr. Goldman had to give a lot of  
13 ground on that.

14 Number three, "Quitting smoking sooner, would  
15 have reduced any possible risk of developing COPD  
16 related to smoking?" I will be talking about the  
17 benefits of quitting a little later, but that's a  
18 brief overview of what Dr. Goldstein had to say.  
19 And we're going to talk about the benefits of  
20 quitting. And the benefits of quitting address  
21 this situation if you were to find, and that's a  
22 big "if", that this smoking was the probable cause  
23 or a significant contributing factor to this COPD.

24 The next slide, which is nine.

25 This one looks very much like the first slide

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1 I told that you I raised with Dr. Goldman on  
2 cross-examination. You see the difference is what  
3 is concluded as we go to the right side of that  
4 date in June of 1995. And this, again, is another  
5 way of viewing the differences between  
6 Dr. Goldstein and Dr. Goldman. It also shows you  
7 how close they are, because it's only after June of  
8 1995 that he has this severe shortness of breath.  
9 It's the result of two-week history of illness. It  
10 was serious enough that he had to be hospitalized,  
11 and he was there for ten days. And he needed this  
12 intensive treatment.

13 Now, that picture, I suggest to you, makes it  
14 more probable that Mr. Eastman's medical condition,  
15 the reasons we're talking about COPD was not caused  
16 by cigarette smoking, it was caused by that severe  
17 infection.

18 The evidence in this case also makes it more  
19 probable that his abdominal aortic aneurysm was

20 caused not by cigarette smoking, but by the  
21 radiation treatment that he received in the early  
22 1960s. In fact you could almost say with respect  
23 to the abdominal aortic aneurysm, it's even  
24 stronger because at least as to that dispute, not  
25 being caused by smoking, there really wasn't much

4279

1 evidence offered by the plaintiff.  
2

3 They didn't offer much more than we told you  
4 in the beginning when we agreed that cigarette  
5 smoking causes aneurysms. When I said to you it  
6 doesn't cause them in every instance, it suggested  
7 to you it wasn't caused in this instance. This is  
8 very much -- this abdominal aortic aneurysm is very  
9 much an example of that kind of situation.

10 Could we look at slide ten, please.  
11

12 These are the findings that Dr. Garrett,  
13 actually, espoused. First of all -- and I believe  
14 doctor Dr. Schwade was in agreement on that.  
15 "Mr. Eastman's abdominal CT scan" -- remember, we  
16 spent some time during the past several days  
17 looking at that slide -- "reveals striking findings  
18 that demonstrate a radiation injury. Dr. Schwade  
19 pointed out to you that radiation can, indeed,  
20 cause this kind of injury to tissue.  
21

22 Mr. Eastman's unusual abdominal aortic  
23 aneurysm involves the entire length of his aorta  
24 and is within the field of radiation. Both  
25 Dr. Schwade and Dr. Garrett found that very  
unusual this was, that it extended the entire

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1 length of that abdominal aorta from the point where  
2 it left the diaphragm up to where the aorta  
3 divides.

4 The other interesting observation made by  
5 Dr. Garrett and, interestingly, one that's  
6 supported by Dr. Back, is that Mr. Eastman's  
7 medical records contain no evidence of any  
8 significant vascular changes outside the field of  
9 radiation. Now, if cigarette smoking were the  
10 cause of these changes, they would have expected  
11 and you should expect to find from the medical  
12 records evidence of vascular changes outside of  
13 that region that the got radiation. There really  
14 wasn't any contrary evidence on this point.

15 If we could move to 11.

16 This makes the point of what I was talking  
17 about typical. If you remember, Dr. Garrett has  
18 looked at thousands of these. Obviously, an expert  
19 who knows what he is talking about, who has spent  
20 years in this field, teaches in it, who has seen  
21 more aneurysms, certainly, than Dr. Back, who said  
22 that it was most unusual, that the typical  
23 aneurysm -- and he knew all of the reasons why,  
24 because of the things that people suspected, at  
least, as the reasons, the decreased small veins in

4281

1 the vaso vasorum, in this area of the aorta.  
2

3 Mr. Eastman's was most unusual, is most unusual, in  
4 that it extends all the way from the diaphragm down  
to that port.

5 Let's look at number 12, if we can.  
6 This is something that Dr. Schwade and  
7 Dr. Garrett were in agreement on. The findings,  
8 these abnormal findings were consistent with a  
9 radiation injury. The abnormal findings were  
10 exactly in the field of irradiation.

11 The reason we brought Dr. Schwade in is that  
12 he did know about radiation, he is a radiation  
13 oncologist. He knows what the standard of care was  
14 back in the early 1960s. He knows how patients  
15 were treated. He described the fields of  
16 radiation. He agreed that these abnormal findings  
17 were within what had been the irradiated field. He  
18 explained that this was in the early days of  
19 radiation. Are the abnormal findings limited to  
20 the field of irradiation? Yes, he said that as  
21 well.

22 The abnormal findings limited to the field of  
23 radiation, what does that refer to? That goes back  
24 to the slide just previous.

25 If we could go back one more a minute.

4282

1 This one. It's the same thing in the way of  
2 saying that his medical records contained no  
3 evidence of significant vascular changes outside  
4 the field of radiation.

5 And can we go forward again.

6 That's in some sense or another saying that  
7 the abnormal findings are limited to the field of  
8 irradiation.

9 Now, what was the testimony they heard on this  
10 subject? Dr. Back pointed out, he acknowledged --

11 Perhaps, if we can put this on the screen,  
12 perhaps not, since it's down.

13 I tell you what I'm going to read this to you.  
14 He was asked about by Ms. Faggianelli:

15 "I would like to ask you a couple questions  
16 about the effects of irradiation, the radiation of  
17 on vessels. Do you have any background and  
18 training with respect to the effects of irradiation  
19 on vessels?"

20 His answer is: "I have no knowledge of it. I  
21 have not done any specific research myself."

22 So when Dr. Back says that he is unaware of  
23 any connection between radiation and this kind of  
24 injury, all he's really saying is he has no  
25 experience with it and, no. Importantly, as I

4283

1 indicated to you before, Dr. Back does -- he also  
2 confirmed that there was extensive calcification in  
3 the wall of the aorta. Remember that? That was  
4 described to you when Dr. Garrett walked through  
5 this and pointed out how the complete circumference  
6 of aorta was calcified and how unusual that was;  
7 how he had never seen anything quite like it.

8 If we could go to page 3698, first, and line  
9 12.

10 We asked for his opinion.

11 "Doctor, do you have an opinion that you could  
12 state within a reasonable degree of medical  
13 probability about what caused Mr. Eastman's  
14 aneurysm?"

15 His answer is yes.

16                    "and what is that opinion?"  
17                    His answer: "I believe that it is more likely  
18                    than not, certainly, and I feel very confident,  
19                    that his aneurysm is caused in his unique case --  
20                    because every patient is different and no patient  
21                    is the same, and usually you can't even guess the  
22                    possible cause of the aneurysm in a given patient.  
23                    But in this case, this unique case, I believe it  
24                    was due to his radiation therapy that he received  
25                    when he was a young man for testicular cancer."

4284

1                    Now, another significant thing about, since  
2                    we're on the subject of abdominal aortic aneurysms,  
3                    is what Dr. Garrett had to say about the relative  
4                    risk factors, that is to say, what are the most  
5                    important factors in considering whether someone  
6                    has -- as to what caused his abdominal aortic  
7                    aneurysm. And remember, he talked about heredity  
8                    being number one.

9                    He allowed that cigarette smoking was a risk  
10                  factor to an abdominal aortic aneurysm too. But I  
11                  want to remind you that he said that was much, much  
12                  less than, say, heredity as a factor. But most  
13                  importantly is what I just pointed you to, his  
14                  testimony, his opinion is unequivocal. He had,  
15                  really, you might say no doubt about what he  
16                  thought caused this aneurysm.

17                  If we could go to 3722.

18                  He was asked this question: "Doctor in the  
19                  thousands of CAT scans that you have looked at, how  
20                  many aneurysms have you seen that are like  
21                  Mr. Eastman's?

22                  That are like his?

23                  Yes."

24                  Answer: "None."

25                  First of all, thousands that he has examined,

4285

1                  none like this one.

2                  Question: "And why did you -- what sets his  
3                  apart from all of the others?

4                  The appearance of the calcification of the  
5                  artery wall is so unique. There are aneurysms that  
6                  can have roughly the same distribution that are  
7                  most unusual, but I have seen those. But not with  
8                  that appearance that we saw on the CAT scan."

9                  And you remember what he was talking about was  
10                 how the calcification went all the way around the  
11                 artery, the entire circumference of the artery.

12                 Can we go to line 21.

13                 And the third basis for his opinion. He says,  
14                 "Well, it's that he has no evidence of significant  
15                 atherosclerotic change or aneurysm development  
16                 anywhere else. His exams have shown normal pulses.  
17                 He has no complaints to indicate that he has  
18                 blocked arteries anywhere. The testing of his  
19                 heart was also okay. His neck arteries seem to be  
20                 okay."

21                 That goes to the point that Dr. Back had to  
22                 concede. There's no signs of any other problem  
23                 outside of that area. And so what I can say to you  
24                 with respect to the abdominal aortic aneurysm is  
25                 that there's just no evidence to support that

4286

1 claim, that it was caused by his cigarette smoking.  
2

3 And, of course, if cigarette smoking was not  
4 the medical cause of either John Eastman's  
5 abdominal aortic aneurysm or his COPD, then you  
6 don't even have to address the other issues of  
7 whether those diseases were legally caused by his  
8 own lifestyle choice. You can proceed to check  
9 "no" on the boxes of that verdict form that  
10 Mr. Acosta showed you this morning, because you  
11 don't have even have to get to these other legal  
12 issues. If it wasn't medically caused, that's the  
end of the case.

13 Now, I want to go back to the point of legal  
14 cause that we've been talking about, and the cause  
15 being Mr. Eastman's lifestyle choices. Our  
16 position is that what he did was absolutely  
17 perfectly 100 percent reasonable and rational on  
18 his part. We're not claiming that he was at fault  
19 in any way whatsoever.

20 Congress has already spoken. As I said to you  
21 in the beginning of the case and as I pointed out  
22 to you in the beginning of my remarks this  
23 afternoon, adults are aware of the risk of smoking,  
24 they are free to choose to smoke and free to  
25 continue to smoke. And so we're still asking you

4287

1 no check no on that verdict form because  
2 John Eastman had a choice, he exercised his choice,  
3 and live is fill with choices. Some people eat too  
4 much fatty food, some drink too much alcohol, but  
5 you don't hurt someone because you've been  
6 drinking. The consequences are your own; they're  
7 the result of your own choses. That's the way we  
8 life live here in America.

9 Mr. Eastman claims our product, cigarettes,  
10 are defectively designed. How? What's the  
11 evidence? They're cigarettes. Tobacco, wrapped in  
12 paper, that people smoke. There's been no evidence  
13 that anyone knows how to take out the harmful  
14 constituents of smoke so that a cigarette is safer  
15 when smoked. There have been a lot of very smart  
16 people working on this subject for a long, long  
17 time and nobody has come up with an answer yet.

18 They know how to reduce constituents. They've  
19 come out with products that try to address this,  
20 that reduce the amount of smoke that people get.  
21 But ultimately, it's a matter of choosing to smoke  
22 the cigarette you want.

23 What Dr. Farrone, the ex-Philip Morris  
24 employee, who was fired, showed you as a proposed  
25 design was no cigarette at all. You can't smoke it

4288

1 because it has a barrier between what he calls a  
2 filter and the rod of tobacco. How you light it is  
3 an interesting question. What you do with it or  
4 why you would light it under the circumstances  
5 makes no sense. As Dr. Lipowicz noted, it's a  
6 nicotine delivery device; it's not a cigarette.  
7 It's a trick. It is not a cigarette.

8 And Dr. Farrone never said, in the course of  
9 his testimony, that with a cigarette that you can  
10 smoke, that the harmful constituents can be removed  
11 from the smoke. He didn't say that. Instead, what

12 have he came up with is this design, which as I  
13 suggest to you, really isn't a cigarette at all.  
14 And the fact that somebody at some other company  
15 may have been looking at this a few years back  
16 means absolutely nothing. So what if they're  
17 looking at it. I'm sure there are many people that  
18 come up with ideas for products, but that product  
19 that I'm pointing out is not a cigarette.

20 Dr. Farrone talked about flue-cured tobacco,  
21 and the argument somehow this morning, I think,  
22 involves a gross understanding -- a  
23 misunderstanding of what flue-curing is all about  
24 to begin with. The problem that Dr. Lipowicz  
25 pointed out, that has been recently discovered, is

4289

1 not that the tobacco is being flue-cured. They  
2 might still be calling it flue-cured, but it wasn't  
3 been being flue-cured at all; there was no flue.  
4 That's what they discovered.

5 You remember how he was describing that when  
6 they discovered what the problems was, that these  
7 propane heaters that they were using, which  
8 everybody thought were fine and clean to burn --  
9 you could burn them indoors and people don't suffer  
10 any consequences -- the problem was that somehow  
11 they were causing this chemical reaction with the  
12 tobacco. And so, how did that happen? Well,  
13 apparently it happened back when they stopped using  
14 flues, as it were, in the '70s when they had the  
15 energy crisis and began using these propane heaters  
16 as opposed to some other form of heat to cure the  
17 tobacco. But that's -- talk about red Herring  
18 arguments, that is a red Herring.

19 Now that it was discovered, and as soon as  
20 it's been discovered, you see what the companies  
21 have been doing, they're going out and equipping  
22 these barns with the appropriate kinds of flues and  
23 heaters.

24 Mr. Eastman claims we failed to warn him of  
25 the health risks of smoking. Well, I want to

4290

1 suggest to you that all of the facts in this  
2 evidence are that at all times that he smoked  
3 Philip Morris products, he already knew the danger  
4 of the serious disease from cigarette smoking. He  
5 didn't need any warning. You find that and you can  
6 recall it throughout the evidence from virtually  
7 all of the witnesses that you heard from.

8 He also chose not to quit, and that's  
9 important considering all of this evidence. Even  
10 if you want to accept the argument that  
11 John Eastman was one of those susceptible smokers  
12 for COPD, and that smoking rather than the  
13 infection caused his 1995 COPD.

14 The evidence is also clear that quitting as  
15 late as 1985 or any time in the '80s or -- and, of  
16 course, that's a bit extreme -- would have saved  
17 him enough lung capacity to live out the rest of  
18 his life. Now, why do I say that? And again, I'm  
19 going to go back to what Dr. Goldman said and what  
20 Dr. Goldstein said, because, again, we find that  
21 both of these pulmonology experts were pretty close  
22 with respect to what they had to say about COPD and

23 smoking.

24 They both said that the normal person loses  
25 the lung function. Dr. Goldman says in the

4291

1 beginning of the 30ccs, you begin to lose lung  
2 function. Remember this chart that was shown, I  
3 believe, in Dr. Goldman's testimony. He didn't  
4 have any quarrel with it. It's the normal decline  
5 in lung function occurs in smokers and non-smokers  
6 alike. But if you're a susceptible smoker, one  
7 who's likely to get emphysema, you lose at a faster  
8 rate.

9 In any event, what they both agreed upon was  
10 that as people age, they lose about 30ccs a year.  
11 Both men testified to that effect. They also  
12 testified that the susceptible smoker loses lung  
13 function at a rate of 100 to 120ccs a year, or  
14 three to four times as fast as you would if you  
15 quit smoking. They also agree that if a  
16 susceptible smoker who's losing at the rate of  
17 100ccs a year quits smoking, he goes back to that  
18 30ccs a year and only loses at the rate of 30ccs a  
19 year.

20 Now, Dr. Goldman said we could do the  
21 calculations ourself on this, and so I have.

22 If we look at number 14.

23 Again, this summarizes what I just told you.  
24 Both of those physicians, both pulmonology experts  
25 agree on the loss that a normal nonsmoker has.

4292

1 Both agree that a susceptible smoker loses at the  
2 rate of 100 to 120. Goldman said, "You can  
3 calculate this on your own, the fact if he quit."

4 Now go to the next slide.

5 All right. We did some calculations. Let's  
6 assume that he had quit in 1985. You know, in 1985  
7 they put a warning on the package of cigarettes  
8 that said, "Cigarettes cause emphysema". That's  
9 one of those rotating warnings that you remember we  
10 looked at earlier. Okay. He didn't quit in 1985.  
11 We know that. That's if he was one of these  
12 susceptible smokers, using the conservative loss of  
13 the 100ccs, not the 120, the higher number, he'd  
14 come out with 1,000ccs that he used up between 1985  
15 and 1995, when he quit.

16 How long would it have taken to lose that same  
17 1,000ccs if he were only losing them at the rate of  
18 30ccs a year? You follow? In other words, if he  
19 had quit smoking in 1985 and he were one of these  
20 susceptible smokers, he would no longer be losing  
21 at the rate of 100ccs a year; he'd lose at 30ccs a  
22 year. Well, we did the math. Divide 1,000ccs by  
23 30ccs and you come up with 33 years.

24 The conclusion is obvious: That if he quit  
25 smoking in 1985, it would have taken him 33 years,

4293

1 or until 2018, and he'd be 90 years old, for his  
2 lung function to decline by that same 1,000ccs.  
3 That's if he is one of those susceptible smokers.

4 Let's move, if we can, to the next slide.

5 And this just illustrates what I just told  
6 you.

7 Can we go to the next one, please?

8           What if he had quit in 1987? That's when he  
9           went to see Dr. Stein who encouraged him to quit.  
10          And in a moment or two I will go over what he told  
11          Dr. Stein and how he reacted to Dr. Stein's advice  
12          to quit.

13          Again, using the same calculations if he had  
14          quit. Eight years of 100ccs a year is 800ccs. How  
15          long would it take him to lose 800ccs if he had  
16          have been a quitter losing at 30ccs a year? Well,  
17          here we are, 26 years. Again, extent it out. If  
18          Mr. Eastman had quit smoking in 1987, it would have  
19          taken him 26 years, or until 2013, for his lung  
20          function to decline by that very same amount of  
21          800ccs.

22          That 2013, he'd be 85 years old. And, as I  
23          said to you, in both instances, in '85 or as late  
24          as '87, his lungs would have lasted his normal  
25          expected life longevity.

4294

1           Life is filled with choices and consequences.  
2           Instead of quitting in 1987, we have Mr. Eastman's  
3           trial testimony about how he reacted to Dr. Stein  
4           urging him to quit smoking. And this was in 1987.

5           Can we look at 19, please.

6           This was in the course of I think my  
7           cross-examination of him.

8           Question: "Do you remember in 1987 saying  
9           that that thoughts didn't cross your mind, that you  
10          weren't interested in quitting smoking?"

11          His answer: "Probably said that, too.

12          That wasn't your attitude, right, to quit?"

13          Answer: "I probably said that, too.

14          Is it that you weren't in the mood to quit?"

15          Answer: "Said that, too."

16          Now, again, life is filled with choices. His  
17          was a reasonable choice. It was a choice that he  
18          was entitled to make. Nothing prevented  
19          John Eastman from quitting his smoking habit. As I  
20          told you in the opening and showed you the slide  
21          earlier, he was no so addicted to smoking that he  
22          had no ability to quit. What it really comes down  
23          to is he didn't really make a good faith effort.

24          Dr. Kaplan was on the stand yesterday and he  
25          told you "quitting takes motivation and

4295

1           commitment." I think he said that more than once  
2           during the course of his testimony. "Motivation  
3           and commitment".

4           When he had that board out, he made it  
5           somewhat clear, too. Remember the board showing  
6           the brain, and he talked about the fact that we as  
7           human beings have a frontal lobe to our brains.  
8           The frontal lobe to the brain helps to you control  
9           your behavior, it gives you the ability to control  
10          your behavior and your pleasure seeking. Things  
11          such as, should I drink, should I smoke, should I  
12          have sex, all are pleasures that are apparently  
13          rooted in the middle part of the brain. But your  
14          frontal lobe, as he explained to you, sends  
15          messages back saying, no, this is appropriate or I  
16          should quit doing this or I shouldn't do this.

17          You have to work at things, though, and we  
18          know that and you know that. You're going to be

19 evaluating this case based on your common sense.  
20 And all of you have had to do things at times that  
21 you found difficult to do or hard to do that you  
22 had to work at. Life is filled with choices. Life  
23 is filled with responsibilities. Life is filled  
24 with difficult tasks at times. You have to work at  
25 quitting if what you want.

4296

1 Dr. Kaplan referred to the Smoke Enders  
2 episode, as Mr. Eastman described it during his  
3 deposition, and he showed you, through  
4 Mr. Eastman's own words, that Smoke Enders episode  
5 was not a genuine quit effort. First of all, it  
6 wasn't Mr. Eastman's idea to quit smoking. I mean,  
7 to call it a quit effort is -- well, he didn't say  
8 I had to quit smoking to go to Smoke Enders.  
9 Rather, this was a situation where Smoke Enders was  
10 offering him money to advertise their product. So,  
11 perhaps, he wasn't really motivated, but certainly  
12 he didn't want to quit smoking at that time and he  
13 chose to continue smoking.

14 Can we look at 22, please?

15 This is the testimony that Mr. Eastman offered  
16 in that respect. This was Mr. Eastman's statement.

17 Question -- and by the way, we're talking not  
18 only about Smoke Enders. The questions goes to  
19 quitting all together.

20 "How long have you known that that some people  
21 have great difficulty in quitting smoking?"

22 Answer: "I have always known it."

23 When did you first decide you were having  
24 great difficulty in quitting smoking?

25 I never tried to quit smoking. I was hired to

4297

1 quit smoking once by Smoke Enders.

2 And I take it that's the first time you have  
3 ever attempted to quit smoking?

4 Yes. Yes, it was.

5 And the reason you did it then was as part of  
6 a promotional?

7 Yes.

8 How much did they pay you?

9 Oh, I don't know. Hundreds of dollars. I had  
10 to surrender and give them their money.

11 But how long did you --

12 I tried for about a week, and I lied for  
13 another week. I lied the whole time, as a matter of  
14 fact. So I quit" --

15 And he's talking about quitting the Smoke  
16 Enders.

17 -- "out of a choice I badly made all my life  
18 between hypocrisy and money.

19 Question: "Okay. Who was the head of  
20 Smokers; do you remember?

21 No.

22 Who approached you about it?

23 A salesman whose name I don't recall" -- or  
24 "don't know." Excuse me.

25 Can we go to the next one?

4298

1 "And would you tell your listening audience  
2 that now you're taking, hey, I'm trying Smoke Enders?

3 Yes.

4 It's really working, it's great stuff?  
5 Yes.  
6 But you weren't really telling them the truth?  
7 No."  
8 Apparently indicating that he was smoking.  
9 "Would you be smoking at the same time you  
10 were using this Smoke Enders?  
11 If it were the opportunity were there, yes.  
12 But the problem was, people outside were looking in the  
13 window laughing at me."  
14 Well, to call this is a quit effort, it's just  
15 not the truth. That's not a quit effort when he's not  
16 quitting at all. He's smoking -- what he's really doing  
17 is smoking while he's using this Smoke Enders.  
18 Question: "Because they would see you smoking  
19 and talking?"  
20 Answer: "I was a fraud. I was a fraud. They  
21 knew it. I said this is it. This can't be. I quit  
22 Smoke Enders."  
23 We go to the next slide.  
24 "Were you actually committed to quitting  
25 smoking using Smoke Enders at this point?"

4299

1 We already know the answer to this, he knows  
2 the answer to this. His answer is: "No, I can't say I  
3 was.

4 Did you ever attempt to quit smoking again  
5 prior to your diagnoses for COPD?

6 No."

7 Well, again quitting takes motivation,  
8 quitting takes commitment. It's something you have to  
9 work at, and no one has suggested at any point that this  
10 is something that you can pick up or walk away from  
11 easily. That's something we told you in the beginning  
12 of the trial. What we said to you that he was never so  
13 addicted to smoking that he couldn't quit; he just  
14 didn't make a genuine effort. I suggest to you that's  
15 what the evidence shows in the case.

16 I only address you once, as you realize. And  
17 because the burden of proof is the plaintiffs to prove  
18 all of the claims that he has in the case, he's going to  
19 have the opportunity to address you again. And I just  
20 ask to you bear in mind and then reflect back on the  
21 evidence when you hear what he has to say in rebuttal to  
22 what I have said. If it's something that you didn't  
23 hear me address in the course of my remarks, it's  
24 because there's been a lot of ground we've covered over  
25 the last several weeks, and I ask you to reflect back.

4300

1 You've been great about taking notes and paying  
2 attention. Think on the evidence. As the judge told  
3 you, what we lawyers have to say to you isn't evidence  
4 anyway. I hope it's been helpful to you in helping you  
5 understand what our position is and what it is we think  
6 the evidence has shown.

7 Eventually and ultimately it's up to you  
8 people to decide whether the plaintiff has proved what  
9 his claims is. Our position is that he has utterly  
10 failed to prove his claims. He's not proved that his  
11 diseases were caused by cigarette smoking. He's not  
12 proved that failure to warn of the dangers of smoking  
13 caused any disease. He's not proven that there's  
14 anything in his tobacco he smoked that was not a natural

15 hazard, a natural thing that's in tobacco.  
16 This discussion about ingredients.  
17 Dr. Lipowicz indicated in his testimony that the  
18 ingredients are tested. There's no testimony from  
19 anybody that suggests that cigarettes have some  
20 ingredients in them that are more hazardous than the  
21 cigarette to begin with. The problem is the tobacco.  
22 The problem isn't any flavoring that might be added to  
23 the cigarette. And the companies have done what they  
24 can, as I told you in the beginning, to reduce the harm,  
25 but the cigarette is tobacco. It's burning plant. It

4301

1 produces smoke. There are hazards to smoking.

2 He's not proven that either company was  
3 negligent not warning about the dangers. He already  
4 knew the dangers. And he's not proven that our product  
5 is inherently unsafe in terms of its design. It's  
6 inherently unsafe by virtue of what it is, a cigarette.

7 For all of those reasons we ask you not to  
8 award him any of the money that he's claiming in this  
9 case. Again, he doesn't have disease caused by smoking.  
10 And even if you were to find that he has a disease  
11 caused by smoking, it's purely a matter of his choice to  
12 smoke, to continue to smoke and not to quit before 1995  
13 when he did.

14 Thank you very much.

15 THE COURT: We're going to take a five minute  
16 comfort break to get set up for the next folks.

17 THEREUPON, the trial continued sine die.

18  
19  
20  
21  
22  
23  
24  
25

4302

1 REPORTER'S TRIAL CERTIFICATE  
2 STATE OF FLORIDA )  
3 COUNTY OF PINELLAS )

4  
5 I, TONYA HORNSBY-MAGEE, Registered Professional  
6 Reporter, certify that I was authorized to and did  
7 stenographically report the trial of the foregoing  
8 proceedings; and that the transcript is a true and  
9 complete record of my stenographic notes.

10  
11 I FURTHER CERTIFY that I am not a relative,  
12 employee, attorney, or counsel of any of the parties,  
13 nor relative or employee of such attorney or counsel,  
14 nor financially interested in the outcome of the  
15 foregoing action.

16  
17 Dated this 2nd day of April, 2003, at  
18 Clearwater, Pinellas County, Florida.

19  
20  
21  
22

TONYA HORNSBY-MAGEE, RPR

23  
24

